



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Robert R. Scott, Commissioner

**FP 2020-47, Env-Wt 300-900 amendments - Spring 2020 Amendments to Wetlands Rules
Summary of Comments on Initial Proposal with DES Responses
September 2, 2020**

Introduction

In June 2019, the Department adopted a comprehensive re-write of the Wetlands rules, subtitle Env-Wt, to be effective in December 2019. Preparation of training materials and other activities in anticipation of the rules taking effect highlighted several rules that needed to be clarified, and amendments were adopted effective December 24, 2019 and January 22, 2020. Since the effective date, implementation of the rules has identified additional provisions that are unclear or that are not working as intended, and has highlighted the need to make changes to some of the forms to clarify them. The proposed amendments to the rules in this compilation are intended to clarify certain rules, modify rules that are not working as intended, and change the date on the forms to accommodate needed revisions. More specific detail of proposed changes was provided in the Rulemaking Notice published in the May 28, 2020 *Rulemaking Register*.

The Department conducted a public hearing on these rules and the related revisions to definitions for subtitle Env-Wt via WebEx on June 29, 2020. Eleven people attended the hearing. In order to ensure that each person had an opportunity to comment, the Department enabled the microphone of each individual one at a time, and comments on the proposed rules were received. The Department heard from one attendee that he was experiencing technical difficulties, which caused him to participate by telephone. He also requested the Department to extend the deadline for written comments; the Department did extend the deadline for the requested additional two weeks. The Department received written comments on the proposed substantive revisions from the public. These comments and the Department's responses are summarized in the attached table and below; certain comments with the Department's responses also are summarized below in numerical order. Written comments also were received from the Office of Legislative Services, Administrative Rules (OLS); those comments and the Department's responses thereto are summarized starting on page 3.

Env-Wt 307.04(b) re: protection of fisheries and breeding areas required

Comment: See attached summary.

Response: The Department believes that further discussions are needed to determine whether (and how) to modify the existing rule, and so has withdrawn this rule from the rulemaking.

Env-Wt 307.10(b) re: dredging activity conditions

Comment: Work should be allowed in a lake or pond if turbidity controls are used.

Response: The Department agrees and has modified the rule accordingly.

Env-Wt 309.06 re: availability of permit-by-notification (PBN)

Comment: Someone should be able to use the PBN process if they want to even if their dock qualifies for a statutory permit by notification.

Response: The Department has revised the rule to allow PBNs to be used for docks that qualify for a statutory permit by notification.

Env-Wt 309.08 re: PBN review procedures

Comment: Incoming mail is quarantined for 4 days due to the pandemic, so we cannot review an application for administrative completeness within 3 days of receipt. This also affects the time frame in (b).

Response: The Department has added 4 days to each timeframe in (a) and (b), but notes that the work will be done as expeditiously as possible.

Env-Wt 310.01 re: EXP submission requirements

Comment: Are the “standard processing timelines” the standard for an EXP or for a standard permit?

Response: The Department has clarified the rule.

Env-Wt 310.02 re: EXP review procedures

Comment: The Department should send requests for more information on EXP applications instead of just denying them.

Response: Language has been inserted to establish a process for requesting more information.

Env-Wt 311.03 re: applications for standard permits

Comment: Saying that a project “pertains” to non-tidal shoreline structures is not very clear.

Response: The Department has clarified the language in (b)(6) and (b)(10).

Env-Wt 311.07 re: demonstration of avoidance and minimization

Comment: Paragraph (b)(4) should apply to non-tidal shoreline structures only.

Response: The Department has made this change.

Env-Wt 313.04 re: mitigation requirements

Comment: Before 12-2019, the size limitation applied only to “new” structures, not total. Should we go back to that?

Response: The Department has revised the rule so the size limit applies only to new structures.

Env-Wt 313.03 re: avoidance and minimization

Comment: The type of construction proposed should be the least intrusive on navigation as well.

Response: The Department has made this change.

Env-Wt 511.04 re: water access structure design requirements

Comment: In paragraph (l), only beaches need to have stormwater diversions.

Response: The Department has made this change.

Env-Wt 513.21 re: design and construction requirements for watercraft lifts

Comment: Personal watercraft lifts should be allowed alongside docks where the space does not qualify as a “boat slip”, for instance because it is too shallow or not long enough.

Response: The Department agrees and has modified the rule accordingly.

Env-Wt 521.06 re: utility project classification

Comment: The size limits in (b)(6) are not consistent with the size limits in Env-Wt 400.

Response: The Department has revised (b)(6) to be consistent with Env-Wt 400.

From OLS:

Comment: *OLS provided a “Note to JLCAR on Legis. Intent:” relative to the rulemaking public hearing being held as a remote public hearing accessed by WebEx due to the pandemic, asserting that “RSA 541-A:11 appears to presume in-person hearings ...”*

Response: The Department believes that nothing in RSA 541-A mandates that a hearing be held in person without the use of technology. Just because the statute does not explicitly allow such hearings does not automatically mean they are disallowed. RSA 541-A was enacted when electronic filings were not even contemplated, yet we have been allowed to file electronically since prior to the statute being amended to explicitly recognize it. Indeed, allowing hearings to be held remotely -- with or without a corresponding “in person” component -- is likely to increase public participation as it will be more convenient for persons who do not live in the area where the hearing is conducted. As noted above, the Department experienced no technical difficulties with the technology used and ensured that each participant had the opportunity to comment. The Department believes that the spirit and intent of RSA 541-A relative to public participation in rulemaking proceedings has been met.

Env-Wt 305.02(b)(2) re: applicability

Comment 1: *“Unclear/Legis. Intent/Lack of Authority: Part i, Article 23 of the N.H. Constitution does not allow for retrospective laws. The proposed amendment modifies a requirement for which the deadline to comply has already passed.” (Bold in original.)*

Comment 2: *“Unclear: Here and subsequently, how does ‘administratively’ modify ‘complete’?” (Bold in original.)*

Response: An application is administratively complete if it contains all of the elements required by the rules. Determining that an application is administratively complete starts the clock on the time periods established for reviewing and making a decision on the application; it does not necessarily mean that the application contains enough information for the Department to determine that the applicable criteria for issuing a permit have been met. “Administratively complete” is a lower threshold for applicants to meet than “complete”, which means that the application contains sufficient information for a decision to be made. Because it is a lower threshold, Part I Article 23 is not implicated.

Env-Wt 306.02 re: activities eligible for a lower scrutiny approval (LSA)

Comments: *“Unclear: What activity will be considered routine?” (Bold in original.)*

Response: “Routine roadway maintenance activities” is a defined term (ref. Env-Wt 104.12).

Env-Wt 306.05 re: activities requiring a standard permit ...

Comment 1: *[In the AARL] “Edit: The emergency rule is now expired.” (Bold in original.)*

Comment 2: *[In text] “Note to Agency: The FP will need to account for the fact that the expiration of the ER has caused the text of the rule to revert to the language found in Document #12803).” (Bold in original.)*

Response: The language adopted as an emergency rule for Env-Wt 306.05(a)(1) was adopted as a regular rule effective June 2, 2020, document #13046. The AARL has been adjusted accordingly, but no adjustment is needed to the text itself.

Env-Wt 309.02 re: projects conditionally authorized by rule

Comment: *“[Paragraph (1)(3) is] “Unclear: What is the process for this? What does ‘confirmed’ mean in this context? Are there existing rules for it?” (Bold in original.)*

Response: The professional association of dive instructors (PADI) has sanctioned a specialized weed control diver class taught by a master dive instructor. There is a classroom portion and an in-water portion before the diver is certified. After people achieve certification, their name is sent to the Department’s Invasive Species Coordinator, who maintains a list of certified weed control divers. The

confirmation relates to the dive instructor confirming (by putting names on a list) that an individual holds the weed control diver certification.

Env-Wt 309.08 re: PBN review procedures

Comment 1: [Subparagraph (d)(1) re: providing LAC consent electronically is] “**Unclear:** Include the web address or rule citation governing this electronic submission.” (Bold in original.)

Response 1: The intent is to allow consent to be filed via email, since the pandemic has made it difficult for LACs to meet with applicants. The rule has been revised to clarify this.

Comment 2: [Subparagraph (e) is] “**Unclear:** How does this differ from ‘administratively complete’ in (d)?” (Bold in original.)

Response 2: The technical review is conducted on an application that is administratively complete, as noted in (d). The Department has revised paragraph (e) to clarify the relationship between (d) and (e).

Env-Wt 310.01 re: EXP submission requirements

Comment: “See comment to Env-Wt 309.08(d)(1).”

Response: See response to comment to Env-Wt 309.08(d)(1), above.

Env-Wt 311.07 re: demonstration of avoidance and minimization

Comment: “**Note to Agency:** It is not possible to tell whether this is a ‘form’ by definition, but please provide a copy to check.” (Bold in original.)

Response: The Department is filing a copy of the checklist with the FP. In any event, the rule contains a date and document number, so the citation is correct.

Env-Wt 312.05 re: technical review; time extensions

Comment: [Paragraph (f) is] “**Unclear:** What occurs if the applicant does not agree? Is the application denied?” (Bold in original.)

Response: Consequences of not obtaining written agreement vary depending on the circumstances. The Department may authorize overtime for staff to review the application so a decision can be made within the time limits; alternatively, the permit-by-default provisions could apply.

Env-Wt 406.03 re: wetlands delineation not required for certain projects

Comment 1: [In the AARL] “**Edit:** The emergency rule is now expired.” (Bold in original.)

Comment 2: [In text] “**Note to Agency:** The FP will need to account for the fact that the expiration of the ER has caused the text of the rule to revert to the language found in Document #12804.” (Bold in original.)

Response: The language adopted as an emergency rule for Env-Wt 406.03(a) was adopted as a regular rule effective June 2, 2020, document #13046. The AARL has been adjusted accordingly, but no adjustment is needed to the text itself.

Env-Wt 522.06 re: classification of agricultural construction projects

Comment: [Highlighted language in (a)(7) and (b)(1) is] “**Unclear:** Does not follow from intro language in (a).” (Bold in original.)

Response: The Department has modified the language.